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Nos. 1200-05.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

In the Matter of
CHICAGO RAILWAYS COMPANY and CHICAGO CITY RAILWAY COMPANY, Debtors, *et al.*

BRIEF OF BONDHOLDERS COMMITTEES IN OPPOSITION.

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Dated April 9, 1947.

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OPINIONS BELOW.

The opinion of the Circuit Court of Appeals (7th) is not yet officially reported; but it is printed in the CCH Bankruptcy Law Service, Current Volume, par. 55,799, p. 58,484. Since it appears that the petitioners have not yet printed the record here, we have supplied printed copies of the opinion.

The district court's findings and order of February 27, 1946, from which the appeal to the Circuit Court of Appeals was taken and the district judge's memorandum opinion of February 15, 1946, are not officially reported. They are printed in the CCH Bankruptcy Law Service, Current Volume, pars. 55,599 and 55,601, pp. 58,082 and 58,096.

The advisory report of the Securities and Exchange Commission to the district judge under Sec. 172 of Chapter X of the Bankruptcy Act (SEC Corp. Reorg. Release No. 65, August 13, 1945) is printed in the CCH Bankruptcy Law Service, Current Volume, par. 55,425, p. 57,683; the supplemental report of the Commission to the district judge (SEC Corp. Reorg. Release No. 66, February 7, 1946) is printed in the same volume of the CCH Bankruptcy Law Service at par. 55,583, p. 58,026.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on January 4, 1947. The petition for writ of certiorari was filed April 3, 1947. The jurisdiction of the Supreme Court is invoked under Sec. 240(a) of the Judicial Code as amended by the Act of Feb. 13, 1925, c. 229 §1, 43 Stat. 938, 28 U. S. C. § 347.

QUESTIONS PRESENTED.

Petitioners hold Series B bonds of Chicago Railways Company, one of five companies whose jointly operated and managed street railways and bus lines constitute the traction system of Chicago known as "Chicago Surface Lines." A plan of reorganization, approved February 27, 1946, and confirmed June 17, 1946, provides for a sale of the traction system (exclusive of net general cash and current assets defined as "retained assets") at an upset price of $75,000,000 in cash; the plan includes an offer of Chicago Transit Authority, a public agency, to bid the amount of the upset price at the sale. The Series B bonds are excluded because the total proceeds available for security holders, including the net assets retained, are not sufficient to pay prior claims in full. The petition challenges the valuation findings which led to the exclusion of the Series B bonds.

If the upset price represents a fair valuation of the properties to be sold, the exclusion of the Series B bonds follows automatically under the strict priority principle of

Case v. *Los Angeles Lumber Products Co.*, 308 U. S. 106 (1939), since there is simply not enough to satisfy prior liens. The district court's findings that the price is fair and that the Series B bonds have no equity or value are supported by two advisory reports of the Securities and Exchange Commission which recommended such rulings in both its original report and supplemental report. A computation of the district judge in his memorandum opinion of Feb. 15, 1946, shows the shortage to be $42,600,000, since $131,000,000 would be necessary to satisfy claims prior to Series B's as against estimated proceeds of $88,100,850 ($75,000,000 purchase price plus net retained assets of $13,100,850) under the plan. This computation, made in February, 1946, reflects interest only to February 1, 1946 on prior securities. If an additional year and one-half's interest on securities prior to the Series B bonds is accounted for, the total value necessary before the Series B bonds could participate would rise from $131,000,000 to over $139,000,000.[1]

In addition to the main valuation question, which controls the right of the Series B bonds to participate in the plan, petitioners present several subsidiary questions. The first of these is whether the order approving the plan deprives petitioners of any rights under the 1907 franchise ordinances from the City of Chicago to the Surface Lines companies, under which the City of Chicago reserved an option to purchase at a price of approximately $172,000,000.

[1] There are two prior classes—the First Mortgage bonds and the Series A bonds. Interest accrues on the First Mortgage bonds at the rate of $2,087,062.50 per annum and on the Series A's at the rate of $784,000 per annum. One and one-half years' interest totals $4,306,593. Since approximately 52% of any increase in the purchase price flows to the A bonds (the rest going to the South Side Lines and to the Purchase Money bonds), an additional one and one-half years' interest adds an additional $8,280,000 to the total amount necessary before the B's could be entitled to participate.

The second is whether the plan was properly submitted to the Illinois Commerce Commission. Finally, they raise the question of whether the plan was presented and filed by a party entitled to file a plan under Chapter X. The second and third of these subsidiary issues are clearly moot so far as petitioners are concerned if they are properly cut off by a no value finding and suffer no deprivation of alleged rights under the 1907 ordinances. *Cf. RFC* v. *Denver Rio Grande,* 328 U. S. 495 at 520 (1946).

STATEMENT.

The five companies which collectively own the Chicago Surface Lines are Chicago Railways Company, Chicago City Railway Company, Calumet and South Chicago Railway Company, The Southern Street Railway Company and Chicago and Western Railway Company. Chicago Railways is known as the "North Side Lines" and the others are known as the "South Side Lines." The Chicago City and Connecting Railways Collateral Trust owns 95% of the common stock of Chicago City Railway and 100% of the stock of the three other south side companies; it has bonds, secured by a pledge of its stocks of the four south side companies, and preferred and common shares outstanding. The capitalization of the five companies and the trust, including interest arrearages on bonds to February 1, 1946, are as follows:

	Stock	Bonds	Interest
Chicago Railways Company:			
First Mortgage Bonds .		$ 41,741,250	$ 1,043,531
Series A Bonds		15,696,600	14,911,770
Purchase Money Bonds		3,969,155	3,770,697
Series B Bonds		16,934,405	16,087,685
Adj. Income Bonds.....		2,379,136	1,808,143
Chicago City Railway Company:			
First Mortgage Bonds..		27,644,550	691,111
Capital Stock .....180,000 shares			
Calumet and So. Chicago Ry. Co.:			
First Mortgage Bonds .		3,332,550	83,314
Capital Stock .....100,000 shares			
Southern Street Ry. Co.:			
Capital Stock .....100,000 shares			
Chi. and W. Ry. Co.:			
Capital Stock ..... 720 shares			
Chi. City and C. Rys. C. Trust:			
First Mortgage Bonds .		20,616,000	19,585,200
Preferred shares.....250,000 shares			
Common shares.....150,000 shares			
Totals		$132,313,646	$57,981,451

The present sale plan was approved and confirmed after twenty years of successive failures of five other plans, each of which involved an exchange of the new securities of a new private corporation for the outstanding securities of the five operating companies and the trust. The last of these failures was the Trustees' plan[1] of February 29, 1944, which was rejected as unsound and unworkable by the Illinois Commerce Commission. At the same time that the Illinois Commerce Commission rejected the Trustees' plan, it approved the present sale plan, which was then sponsored by the City of Chicago on the condition that the Transit Authority be substituted for the City as the purchaser. The substitution of the Transit Authority was effected through an assignment approved by the district court pursuant to a provision for such assignment then contained in the plan. Despite the fact that petitioners know of the Illinois Commerce Commission's approval of this plan conditioned on the Transit Authority's substitution for the City, they nevertheless state in their petition that the plan never went to the Illinois Commerce Commission, and they actually urge that as one of the grounds for the issuance of the writ of certiorari.

Shortly after the Illinois Commerce Commission certified its approval of the plan, the SEC rendered its first advisory report, filed August 13, 1945, to the district judge. The Commission advised the court that the Series B bonds had no equity and should be excluded. It also recommended that the offer of $75,000,000 would be fair if two changes were made in the plan. The first change recommended was

[1] Despite the fact that petitioners know of this plan and its rejection by the Illinois Commerce Commission (see petitioners brief, footnote 8, page 38) they repeatedly state in their petition that no plan was ever filed by the Trustees. They actually assume that this plan is not a "plan" because they do not like its provisions for unification with the elevated system of Chicago Rapid Transit Company whose trustees filed a corresponding plan in the Rapid Transit 77-B proceedings.

that the plan be amended to provide for a waiver by the City of Chicago of its claim to a fund known as the "City Compensation Fund," in which $6,000,000 had been escrowed pending the court's decision on the question of the liability of the Trustees to the City for compensation for the use of city streets by streetcars and busses. The second change recommended by the SEC was that the plan provide for the retention by the Trustees of net earnings to the date of actual transfer instead of to an earlier cut-off date then provided for in the plan. These changes were subsequently made, whereupon the six bondholders committees, representing the six participating classes of securities, approved, adopted and joined in the plan. In spite of the fact that these six committees approved, adopted and joined in the plan, and in spite of the fact that the actual owners (not committees) of $89,220,000 of bonds entitled to participate filed individual proofs of claims and formal written acceptances of the plan, petitioners nevertheless contend in this court that the plan is not a creditors' plan.

After lengthy hearings which ran from September, 1945 to February, 1946, the district judge again referred the plan to the SEC for a supplemental advisory report. The Commission reported to the court that, in its opinion, the plan was fair and equitable. Thereafter, the district judge set forth in a memorandum opinion dated February 15, 1946, his reasons for approving the plan. Detailed findings of fact, conclusions of law and an order of approval were entered on February 27, 1946. After this the plan was submitted to security holders for their vote. Approximately 98% of those who filed individual claims which were allowed voted affirmatively to accept the plan, which, on June 17, 1946, was confirmed. Two classes were excluded by "no value" findings—the Series B bonds and the Chicago City Railway stock. Each class was excluded because

prior liens were not satisfied in full. From the approval and confirmation orders certain holders of Series B bonds and holders of the minority stock of Chicago City Railway Company perfected appeals. The Circuit Court of Appeals affirmed on January 4, 1947 and the B bonds have filed the petition for a writ of certiorari.

A sale of the plan properties at $75,000,000 plus the retained assets of $18,400,850 would result in total gross proceeds from all sources of $93,400,850. After provisions for reserves under the plan for federal taxes, price adjustments with the Authority and expenses and contingencies, the sum of $88,100,850 is estimated as available for initial distribution to security holders. The following chart shows the proceeds available to each of the surface lines companies from all sources, together with its retained assets and reserves:

TABLE I.

ESTIMATED SUM AVAILABLE TO COMPANIES FOR INITIAL DISTRIBUTION.

	Allocation of $75,000,000 Purchase Price for Plan Properties	Allocation of Escrowed Compensation Fund (Estimated as at Dec. 31, 1945)	Net Cash as at Dec. 31, 1945, as estimated by SEC in Advisory Report (After provision for 1st Mortgage Interest to December 31, 1945)	Less Reserve for Adjustments Under Article II, Section E and for Reorganization Expenses and for all other Claims and Contingencies	Reserve for Federal Taxes	Estimated Aggregate Sum Available for Initial Distribution
Chicago Railways Company:						
Total	$44,475,000.00	$3,600,000.00	$ 8,561,868.00	($2,400,000.00)	x x x x	$54,236,868.00
South Side Lines:						
Chicago City Railway Co.	24,966,397.50	1,935,600.00	596,625.00	(1,200,400.00)	(918,000.00)	25,290,222.50
Calumet and South Chicago Railway Company	4,717,500.00	404,400.00	2,584,753.00	(269,600.00)	(258,000.00)	7,179,053.00
The Southern Street and Chicago and Western Railway Companies	841,102.50	60,000.00	657,604.00	(40,000.00)	(124,000.00)	1,394,706.50
Total	$30,525,000.00	$2,400,000.00	$ 3,838,982.00	($1,600,000.00)	($1,300,000.00)	$33,863,982.00
Total Surface Lines	$75,000,000.00	$6,000,000.00	$12,400,850.00	($4,000,000.00)	($1,300,000.00)	$88,100,850.00

Parenthesis ( ) denotes deduction for reserves.

The sum available to each of the companies, as shown in Table I, is distributed to the security holders of each of the companies in accordance with the rules of strict priority. Two first mortgage bond issues—a $41,741,250 issue of Chicago Railways Company and a $3,332,550 issue of Calumet and South Chicago Railway Company—are paid in full. A third issue of first mortgage bonds—a $27,644,550 issue of Chicago City Railway Company—receive $25,286,204, or approximately 91.47% of principal. The Series A and Purchase Money Bonds of Chicago Railways Company, which are divisional second liens, receive $10,918,596 and $1,525,666 in the aggregate, respectively, or 69.56% and 38.44% of principal. The holders of the Chicago City and Connecting Railways Collateral Trust receive $5,236,825 in the aggregate, or 25.40% of principal.

ARGUMENT.

I.

VALUATION.

Valuation is the crux of the case here, since that question controls the right of the Series B bondholders to participate in a plan. If the value of the property does not exceed prior claims, the Series B bonds, which were issued under a 1907 reorganization plan consummated five years before the *Boyd* case[1] was decided, not only may, but must, be excluded. *Case* v. *Los Angeles Lumber Products Co.*, 308 U. S. 106 (1939).

The court below complied exactly with the standards established by this Court in *Consolidated Rock Products Co.* v. *DuBois*, 313 U. S. 510 (1941), *Group of Institutional Investors, et al.* v. *Chicago M. St. P. & P. R. R. Co.*, 318 U. S. 523 (1943), and *Ecker* v. *Western Pacific R. Corp.*, 318 U. S. 448 (1943). The district judge based his valuation findings on a capitalization of prospective earnings. In the findings of fact and conclusions of law of February 27, 1946, the district judge found that:

> "The court in the exercise of an informed and independent judgment under all the circumstances and upon all the data and upon specific consideration of prospective earnings of the properties of Chicago Surface Lines finds that the sum of $75,000,000 * * * is a fair, equitable and reasonable upset price for the plan properties."

The concurrence of the court's findings and the SEC's advisory reports reflects the compliance of the district

[1] *Northern Pacific Ry.* v. *Boyd*, 228 U. S. 482 (1912).

court with the standards established by this court, for the SEC's recommendations which the district court accepted are based entirely on an extensive analysis of all earning capacity elements. We submit that the Circuit Court of Appeals was clearly correct when it stated:

> "It [the evidence] revealed that the present plight of Surface Lines was largely the result of increased expenses, bus competition, and the use of the private automobile, and the court had before it exhibits and testimony which translated this declining trend into capitalized value by capitalizing the average net earnings for the 15-year, 10-year, and 5-year periods before and including 1944. The net of the five years through 1944 capitalized at 5.5% brought a value of $77,428,000 and if capitalized at 7%, a value of $60,836,000. It is clear that the court considered every proper factor suggested by the parties, and having in mind that an estimate, as distinguished from mathematical certitude, was all that could be made, *Group of Investors* v. *Chicago, M., St. P. & P. R. R., supra,* 542, it bottomed its finding of value upon all the evidence before the court. In addition it had the benefit of expert and disinterested advice, rendered in conformity with a report of the SEC under sec. 172 of Chapter X. True, the report was not evidence. It was but advisory, intended to aid the court in the solution of the many complicated financial and business problems involved.
>
> "Under these circumstances we think the court applied the correct juridical concepts of value relevant in reorganization cases, and since the court's finding of value was made on disputed evidence, we cannot say that the finding of a value of $75,000,000 was without support in the record; consequently, the orders must be affirmed."

What then is the valuation issue on this petition for certiorari? Shortly stated, it is that petitioners want this court to turn appraiser in this case. But this court does

not test the lower federal courts' application of general principles to specific facts by reviewing facts *de novo*. "We do not grant a certiorari," said Mr. Justice Holmes in *U. S.* v. *Johnston*, 268 U. S. 220 at 227 (1925), "to review evidence and discuss specific facts." See also *General Picture Co.* v. *Electric Co.*, 304 U. S. 175 at 178 (1938).

The valuation case against the Series B bonds is not a close question. As we indicated above, in stating the questions involved, the valuation of $75,000,000 would have to be increased by over $50,000,000[1] in order to produce total proceeds of $139,000,000, sufficient to meet the deficiency on senior securities, before the B bonds would be entitled to participate. Thus, the district court, the Circuit Court of Appeals, and the SEC would have to be in error by that amount, or 66⅔% of the $75,000,000 price. There is nothing in the record indicating that two federal courts and the SEC could possibly have made such an error in their carefully considered calculations.

II.

THE 1907 ORDINANCES.

A. The ordinances do not contain any contract of the City to buy at the ordinance purchase price. The City reserved an option to purchase at that price. It also reserved the right to bid at any sale.

Petitioners have attempted to create the impression that the 1907 ordinances constitute a binding contract on the part of the City to buy the properties at the ordinance purchase price of $172,000,000 and that this obligation somehow can be the subject of a specific performance decree. Section 20 of the 1907 ordinances merely provides that the

[1] This reflects one and a half years' additional interest on securities prior to the B's since the district judge's computation of February, 1946.

"City hereby reserves to itself the right * * * to purchase * * * the entire street railway system * * *." Likewise, the provisions of Sections 21 and 22 made it perfectly clear that the City has the right, not the obligation to buy.

It is expressly recognized in the ordinance that purchase through the exercise by the City of its option is not the exclusive means by which the City might acquire the properties. In Section 32, which provides that a purchaser "at any foreclosure or other sale" acquires no greater rights than his predecessor and holds the property subject to the City's option, there is this very significant provision:

> "The City shall have the right to bid and become the purchaser at any such foreclosure or other sale."

The 1907 ordinance, therefore, recognized the possibility of a "foreclosure or other sale" to satisfy the claims of creditors. In any such sale, the franchises granted under the 1907 ordinances, which were included in the property covered by the mortgage liens, would also be sold with the other assets. The City, by the express terms set forth in the foregoing quoted paragraph of Section 32, would be entitled to bid and acquire the assets sold, including the 1907 ordinance rights, like any other prospective purchaser.

The Circuit Court of Appeals was clearly right in holding that the City has an option, not a duty, to buy at the ordinance purchase price.

B. Section 23 of the ordinances of 1907 does not prevent the Authority from buying the properties at their fair upset price.

(1) Section 23 applies to a competing company, not to a successor.

The last sentence of Section 23 of the 1907 ordinances provides that if the City does not exercise its option to purchase but grants "a right to another company to operate a street railway in the streets and parts of streets constituting the said street railway system of the Company, such new company shall be required to and shall purchase and take over the street railways, property and rights of the Company at or after February 1, A.D. 1927 upon the same terms upon which the said City might then purchase and take them over." The petitioners point out that the City of Chicago granted a franchise ordinance to Chicago Transit Authority. They argue, therefore, that Chicago Transit Authority has become liable for the full ordinance purchase price.

The argument appears to be that the whole world (including the City of Chicago) may bid at the sale, except the Transit Authority; that the Transit Authority is subject to a special exclusion because its franchise from the City and the provisions of Section 23 of the 1907 ordinances make it liable to pay the City purchase price.

The franchise which the City granted the Authority was given to it pursuant to Section 311 of the Metropolitan Transit Authority Act, 1945 Ill. Rev. Stats., Chapter 111⅔, Sec. 311. This statute requires the Transit Authority to have a franchise from the City before it acquires the Transit properties. The petitioners, therefore, pose this technical dilemma: the Authority, in order to bid $75,000,000 for the properties under this plan must first have a

franchise; the instant it takes such a franchise so as to qualify itself to bid $75,000,000, it automatically becomes liable under Section 23 to pay the companies the City purchase price of $172,000,000.

Section 23 was designed to protect the Surface Lines from *competition* by another carrier in the same streets on which they were granted franchises under the 1907 ordinances. If the City had granted the 1945 franchise to the Transit Authority in order to enable the Authority to compete with the Surface Lines in those streets covered by the 1907 ordinances, then questions might arise as to (a) the validity or interpretation of Section 23, (b) whether the Surface Lines' rights under that section survive the stated expiration date.

If, as and when the Authority, armed with its franchise, undertakes a campaign to compete with the Surface Lines, these questions—which will be moot if the present plan succeeds—may be raised and faced in the state courts of Illinois. But that is not this case. The Transit Authority is not competing; nor was its ordinance granted to it to permit it to operate a competitive system. The ordinance was granted as a step in the consummation of the present plan in anticipation of the Transit Authority's purchase of the properties. Section 23 applies when a grant is made to a competing company, not when a grant is made to a corporate entity which is to succeed to the Surface Lines properties.

(2) The rights under Section 23 are released under the plan and the strict priority principle deprives petitioners of any interest in such a release.

When the properties were valued through a capitalization of prospective earnings, it was assumed that the properties, like an industrial corporation, would operate indefinitely in the future. The projection of prospective earnings into the future was not cut short at any arbitrary point on any assumption that the operating rights would come to an end. It follows that the full measure of value of the rights accruing to the companies under Section 23—whatever they may be—were included in the enterprise value of the Surface Lines System. After giving due consideration for all the rights accruing under Section 23 and their effect upon the going concern value of the system, based on a capitalization of prospective earnings, the petitioner classes of security holders have been found to have no equity and their claims are adjudged to be valueless.

The grant of an ordinance to the Chicago Transit Authority is but a step in the consummation of the plan—the same plan that provides for a release of the 1907 ordinance rights. The granting of a franchise to the Authority and the releasing of the rights accruing under the 1907 ordinances should be viewed as steps necessary to the consummation of the plan of reorganization and not as separate and independent transactions. Valueless classes of securities, if they have no right to participate after a valuation on a capitalization of prospective earnings basis, can derive no new rights under an act which is but a step in the consummation of the plan from which they were properly excluded.

III.

ILLINOIS COMMERCE COMMISSION APPROVAL.

Petitioners contend that the district court failed to submit the plan to the Illinois Commerce Commission for its approval. This is not true. As heretofore indicated in our Statement above, the plan was submitted to the Illinois Commerce Commission and was approved by it. At the time of its submission it was sponsored by the City of Chicago and the Commission's approval was conditioned on an assignment by the city of its interest under the plan to the Authority. That assignment was subsequently made and approved by the district court.

IV.

SPONSORSHIP OF THE PLAN.

Petitioners state that the court's Trustees did not file a plan as required by Sec. 169 of Chapter X. The fact is that the Trustees filed a plan pursuant to order of court. That plan was thereafter referred to the Illinois Commerce Commission and disapproved by it, as indicated above in our Statement. This plan provided for the reorganization of the Surface Lines through unification with Chicago Rapid Transit Company. It was a plan which in every way complied with Section 169 of Chapter X. The law does not require the Trustees to file a plan to which all parties will agree. The sole requirements of Section 169 is that they file a plan of reorganization. Plainly, they did file such a plan in this case.

Petitioners also argue that the present plan is not a creditor's plan. The City, when it originally filed it, was

a large creditor—its claims being released under the plan in exchange for a similar release by the Trustees. The six participating bondholders committees joined in and approved the plan when it was assigned to the Authority. The individual holders of over $89,000,000 of participating classes of bonds, as indicated above in our Statement, filed claims and formal written acceptances of it. Yet non-participating bondholders claim it is not a creditors' plan!

V.

THIS CASE DOES NOT FALL WITHIN RULE 38.

This case presents no question of general importance sufficient to warrant the issuance of the writ here sought. There is not involved any question of lack of uniformity of decisions, nor a conflict with prior decisions of this court or the state courts. No important question of federal law exists, nor was there a departure from usual or accepted procedure. No such claims are made by the petitioners. The sole basis for the petition is that petitioners disagree with the decision of the Circuit Court of Appeals. None of the questions raised in the petition falls within the reach of this court's Rule 38, specifying the character of cases in which certiorari will be considered.

The purpose of the writ is not to give the defeated party another hearing. See *Magnum Co.* v. *Coty*, 262 U. S. 159 (1923).

None of the grounds alleged in the petition is sufficient reason for the court's exercising its discretion to grant a writ.

CONCLUSION.

There is no conflict in the circuit courts and no question of general importance involved. The opinion of the Circuit Court of Appeals is clearly correct and the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated April 9, 1947.